No. 47258-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOHN RUSSELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY,

REPLY BRIEF

Jan Trasen
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

United States Supreme Court

Statutes

A. ARGUMENT.

1. "INTENT TO PRODUCE A SPECIFIC RESULT ... IS DIFFERENT FROM THE "INTENT TO DO THE PHYSICAL ACT THAT PRODUCES THE RESULT."

a. The State misapprehends the mens rea required to prove Assault in the First Degree.

The State was required to prove at trial that Mr. Russell actually intended to kill Ms. Johnson, or that he intended to inflict injuries so serious that they would create a probability of death.

Under RCW 9A.36.011(1), the *mens rea* required to commit assault in the first degree is the specific intent to commit great bodily harm. State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). "Specific intent is defined as *intent to produce a specific result*, as opposed to intent to do the physical act that produces the result." Elmi, 166 Wn.2d at 215 (quoting State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994) (emphasis added)).

Thus, the State was required to show that Mr. Russell specifically intended – not just the physical act of holding, opening, or even slashing the knife, as the State suggests – but that he intended to cause the specific result that followed -- the grave injuries to his neighbor. See Elmi, 166 Wn.2d at 215.

To support Mr. Russell's conviction for assault in the first degree, the State thus had to prove that he actually intended to kill Ms. Johnson, or that he intended to inflict injuries so serious that they would create a probability of death. The State did not meet this burden.

Mr. Russell was intoxicated to point of unconsciousness at the time of the assault. RP 117-18, 135. The State's other witness, Mr. Stone, noted that Mr. Russell could barely drink without liquids spilling out of his mouth. Id. The deputies found Mr. Russell in an "alcohol-induced coma," until he regained consciousness in the patrol car, more than two hours later at the county jail. RP 155-57, 165.

The State argues that through Mr. Russell's conduct and words, he was "able to articulate a reason for his actions." Brief of Respondent at 5-6. However, Mr. Russell's words in no way indicated that he possessed the "intent to produce a specific result, as opposed to [the] intent to do the physical act that produces the result." Elmi, 166 Wn.2d at 215 (internal citation omitted).[1]

[1] Mr. Russell's drunken explanation to Mr. Stone that he "just wanted to show that people will do things for no reason" hardly indicates a specific intent to cause great bodily injury or death to Ms. Johnson, as required. RP 101-02.

b. Because the State failed to meet its burden to prove assault in the first degree, reversal is required.

Accordingly, the State failed to meet its burden to prove the essential elements of assault in the first degree. Mr. Russell's conviction for assault in the first degree should be reversed, and this case remanded for a new trial on a single count of assault in the second degree. See Elmi, 166 Wn.2d at 215.

In the alternative, since the jury was instructed on the lesser included charge of assault in the second degree, the remedy is vacation of the assault in the first degree conviction and remand for entry of the lesser offense of assault in the second degree. In re Heidari, 174 Wn.2d 288, 296, 274 P.3d 366 (2012).

2. THIS COURT SHOULD CONSIDER MR. RUSSELL'S ABILITY TO PAY DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

Courts may require an indigent defendant to reimburse the state for only certain authorized costs, and only if the defendant has the financial ability to do so. State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015) ("the state cannot collect money from defendants who cannot pay"); see also Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW

10.01.160(3) ("The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them").

Despite the State's argument, there is no evidence the trial court did the "case-by-case analysis" required by courts in this state. Blazina, 182 Wn.2d at 834. Only by conducting such a fact-specific inquiry may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.; RCW 10.01.160(3).

The State notes its apparent concern over the resources that would be required for Mr. Russell to be granted a remission hearing. Brief of Respondent at 8-9. However, our Supreme Court clearly held in Blazina that an individualized inquiry -- including consideration of such factors as incarceration and other debts such as restitution payments – is what is owed Mr. Russell. 182 Wn.2d at 838.[2]

Because the trial court failed to exercise its discretion in the imposition of LFOs, this Court should remand for resentencing.

B. CONCLUSION

For the reasons stated above and in appellant's opening brief, the evidence was insufficient to prove the essential elements of assault in the

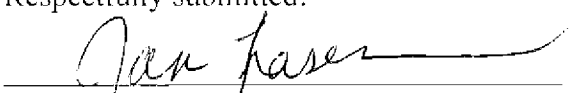
[2] The State also refers to the remission hearing somehow requiring an entirely new appeal, with the appointment of new counsel. Brief of Respondent at 8-9. The State's suggestion that new appellate counsel might file an Ander's [sic] brief seems inapposite to the posture of this appeal. Id. at 9.

first degree. The conviction should be reversed, and this case remanded for a new trial on the charge of assault in the second degree.

In the alternative, the matter should be remanded for resentencing so that the Judgment and Sentence may be corrected and the errors in sentence corrected.

DATED this 12th day of February, 2016.

Respectfully submitted:



JAN TRASEN (WSBA 41177)
Washington Appellate Project (91052)
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 47258-9-II
	)	
JOHN RUSSELL,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KATHERINE SVOBODA, DPA [ksvoboda@co.grays-harbor.wa.us] GRAYS HARBOR CO PROSECUTOR'S OFFICE 102 W. BROADWAY AVENUE, ROOM 102 MONTESANO, WA 98563-3621	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA COA PORTAL
[X] JOHN RUSSELL 380823 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF FEBRUARY, 2016.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
(206) 587-2711

WASHINGTON APPELLATE PROJECT

February 12, 2016 - 4:28 PM

Transmittal Letter

Document Uploaded: 3-472589-Reply Brief.pdf

Case Name: STATE V. JOHN RUSSELL

Court of Appeals Case Number: 47258-9

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

ksvoboda@co.grays-harbor.wa.us